APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 73-1581

WELLMAN INDUSTRIES, INC.,

Appellant,

—versus—

THE NATIONAL LABOR RELATIONS BOARD and EDWARD B. MILLER, JOHN H. FANNING, HOWARD JENKINS, JR., RALPH E. KENNEDY, JOHN A. PENELLO, Members of the Board, and REED JOHNSTON, Regional Director for the Eleventh Region,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT FLORENCE. ROBERT F. CHAPMAN, DISTRICT JUDGE.

(Argued November 7, 1973 Decided January 22, 1974)

Before: BOREMAN, *Senior Circuit Judge,* and CRAVEN and FIELD, *Circuit Judges.*

JEFFREY S. DUBIN (Peter D. Hyman, Hyman, Morgan and Brown and Mirkin, Barre, Saltzstein and Gordon, on brief) *for Appellant;* R. Bruce McLean, Attorney (Peter G. Nash, General Counsel, John S. Irving, Deputy General Counsel, Patrick Hardin, Associate General Counsel,

Elliott Moore, Deputy Associate General Counsel, and Abigail Cooley, Assistant General Counsel, National Labor Relations Board, on brief) *for Appellees.*

CRAVEN, *Circuit Judge*:

Wellman Industries, Inc., appeals from an order of the district court denying it access under the Freedom of Information Act, 5 U.S.C. § 552, to affidavits obtained by an NLRB investigator during his inquiry into Union objections to a representation election held at Wellman's Johnsonville, South Carolina, facility. These affidavits, Wellman alleges, were the basis of an order by the Regional Director of the NLRB setting aside that election.

At a second election a majority of Wellman's employees chose the Union as their bargaining representative, and the Union was so certified after objections by Wellman were dismissed and a Request for Review denied by the Regional Director. On September 26, 1972, the Union requested that Wellman bargain; that request was refused on October 4, 1972. The Board then issued a complaint charging the Company with refusal to bargain under Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5). The Company raised the defense of improper certification; whereupon General Counsel for the Board moved for summary judgment, and the matter was transferred to the Board in Washington, D. C., by order dated November 15, 1972. Wellman filed a statement in opposition to the motion for summary judgment, together with cross-motions seeking affidavits and memoranda under the FOIA. On May 30, 1973, the motion for summary judgment was denied by the Board and the case remanded to the Regional Director for a hearing on the question of newly-discovered evidence relating to the April 1972 (second) election.

On January 25, 1973, the Company filed the complaint in this case. Without specifically deciding whether exemptions 4 and 7 of the FOIA were applicable,[1] the district court relied upon its equitable power not to issue an injunction where an adequate remedy at law was available and where such action would produce circuity of action, stating: "Foremost in the mind of the Court is the fact that the question of the Plaintiff's rights under the Freedom of Information Act will be before the Circuit Court of Appeals in the very near future, whether this Court does or does not issue an injunction." Wellman appeals, and we affirm, though not for the reasons given by the district judge.

The district court's "balancing of the equities" approach[2] to withholding injunctive relief under the FOIA is not without support, *see General Services Administration* v. *Benson*, 415 F.2d 878 (9th Cir. 1969); *Consumers Union* v. *Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969); Davis, *Administrative Law Treatise* § 3A.6, at 123-24 (1970 Supp.) (hereinafter cited as Davis). However, this court noted in *Wellford* v. *Hardin*, 444 F.2d 21 (4th Cir. 1971), that:

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[1] The district court's order referred to the Board's argument that exceptions 4 and 7 exempted the affidavits from disclosure under the FOIA as "rather weak" and went on to state:

> As to exception 7, it must be remembered that this is not information originally contained in "investigatory files compiled for law enforcement purposes." The statements and affidavits were taken in connection with the certification election, a non-adversary proceeding, and before any complaint was brought by the Board for an unfair labor practice.

[2] The district judge stated in his order:

> In considering whether or not to issue an injunction, this Court must consider all of the facts before it, the purposes and needs of the parties, the burdens involved, the importance of the information and the reasons for non-disclosure.

> After considering voluminous testimony on both sides and balancing the public, private, and administrative interests, Congress decided that the best course was open access to the governmental process with a very few exceptions. It is not the province of the courts to restrict that legislative judgment under the guise of judicially balancing the same interests that Congress has considered.

444 F.2d at 24-25. Again, in *Robles* v. *Environmental Protection Agency,* 484 F.2d 843 (4th Cir. 1973), we said, in another context:

> Equally unpersuasive is the argument that disclosure should be refused because it "would do more harm than good". Such an argument has nothing to do with "personal privacy" but is rather an argument that courts, in disposing of actions under the Act, may exercise discretion to grant or deny equity relief. While such argument has received some limited support, the better reasoned authorities find no basis for this balancing of equities in the application of the Act; indeed, the very language of the Act seems to preclude its exercise.

484 F.2d at 847. We adhere to that viewpoint and hold that 5 U.S.C. § 552(c) means what it says: that the Act "does not authorize withholding of information or limit the availability of records to the public, *except as specifically stated in this section.*" (Emphasis added.)

We must, therefore, look to the specific exemptions provided for in the Act. The Board suggests the affidavits are protected from disclosure as within two exemptions: (1)

"trade secrets and commercial or financial information obtained from a person and privileged or confidential;" and (2) "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency; . . . "[3] We think the affidavits are clearly within the second exemption and thus need not decide whether they also fall within the former. *See generally, Consumers Union* v. *Veterans Administration,* 301 F. Supp. 796, 802 (S.D.N.Y. 1969); Davis, *supra* at § 3A.19.

Wellman argues that while the investigatory files exemption applies to information obtained *after* an unfair labor practice complaint has been filed, it does not protect material obtained in Board investigations of representation election irregularities prior to the filing of an unfair labor practice charge since no enforcement proceedings were contemplated and the entire process was non-adversary in nature. *But see Evans* v. *Department of Transportation,* 446 F.2d 821 (5th Cir. 1971). While it is true that the cases cited by the Board uphold non-disclosure under exemption 7 only with regard to files assembled after an unfair labor practice complaint was filed by the Board, *Clement Bros., Inc.* v. *NLRB,* 282 F. Supp. 540 (N.D. Ga. 1968), *Barceloneta Shoe Corp.* v. *Compton,* 271 F. Supp. 591 (D.P.R. 1970),[4] we believe appellant urges too narrow a view of "law enforcement purposes."

Congress has given the Board wide discretion in the enforcement of rights guaranteed by Section 7 of the Na-

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[3] These exemptions are contained in 5 U.S.C. § 552(b)(4) and (7) and are commonly referred to as exemptions 4 and 7.

[4] *See also* Frankel v. Securities and Exchange Comm'n, 460 F.2d 813 (2d Cir.), *cert. denied* 409 U.S. 889 (1972); *cf.* Bristol-Myers Co. v. FTC, 424 F.2d 935, 939-40 (D.C. Cir.), *cert. denied* 400 U.S. 824 (1970).

tional Labor Relations Act, 29 U.S.C. § 157. Under Section 9 of the NLRA, 29 U.S.C. § 159, the Board is responsible for supervising elections, investigating election irregularities and certifying bargaining representatives. When an election investigation is undertaken, as in this case, there is no certainty that an unfair labor practice proceeding under Section 8 will follow. The election irregularities themselves may be sufficient to trigger an unfair labor practice complaint, *see NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), or they may lead only (as here) to avoiding the results of the election and the holding of a second election. In this latter case there is no direct review of such a determination, and in order to challenge the union's certification the employer must refuse to bargain, triggering unfair labor practice proceedings under Section 8(a)(5), as Wellman has done. *A.F.L.* v. *NLRB*, 308 U.S. 401, 407-09 (1940); *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-79 (1964). Whether or not resulting in an unfair labor practice charge, the Board's purpose here was to protect and vindicate rights set out in Section 7. Though procedures vary, if aimed at enforcement of the NLRA we think they are "for law enforcement purposes."

The legislative history of exemption 7 clearly supports such an interpretation.[5] The House Report states:

> This exemption covers investigatory files related to enforcement of *all kinds of laws, labor and securities laws as well as criminal laws.* This would include files prepared in connection with related Government litiga-

[5] The weight which we attribute to the legislative history of exemption 7 is considerably greater than that attributable to the legislative history of exemption 4 for reasons set out by Davis, *supra*, at §3A.19 and §3A.22.

> tion and adjudicative proceedings. S. 1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings.

H. R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966) (emphasis added). The Senate Report, in not so broad terms, indicates that:

> These [investigatory files] are the files prepared by Government agencies to prosecute law violators. Their disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in court.

S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). While the Senate's use of the term "law violators" might be construed to mean transgressions of the criminal law, it can also easily be accommodated to the House statement without doing damage to the statutory language. *See Clement Bros., Inc.* v. *NLRB,* 282 F. Supp. 540 (N.D. Ga. 1968); *Barceloneta Shoe Corp.* v. *Compton,* 271 F. Supp. 591 (D.P.R. 1970).

The practical reasons favoring application of exemption 7 have already been sufficiently exposited by this court and numerous others. We said in *Intertype Co.* v. *NLRB,* 401 F.2d 41 (4th Cir. 1968), *cert. denied* 393 U.S. 1049 (1969), a case almost precisely identical with the case at bar, but decided prior to the effective date of the FOIA, relying on the language of *NLRB* v. *National Survey Service, Inc.,* 361 F.2d 196, 206 (7th Cir. 1966), that:

> If an employee knows that statements made by him will be revealed to an employer, he is less likely, for

> fear of reprisal, to make an uninhibited and non-evasive statement.

401 F.2d at 45. *See also Intertype Co.* v. *Penello,* 269 F. Supp. 573 (W.D. Va. 1967). This same concern has continued to be echoed by courts since the enactment of the FOIA. *See, e.g., Frankel* v. *SEC,* 460 F.2d 813, 817-18 (2d Cir.), *cert. denied* 409 U.S. 889 (1972); *Evans* v. *Department of Transportation,* 445 F.2d 821, 823-23 (5th Cir. 1971); *Clement Bros., Inc.* v. *NLRB,* 282 F. Supp. 540, 542 (N.D. Ga. 1968). We have also stated our agreement with the proposition so clearly set out in the legislative history that exemption of investigatory files is necessary in order to prevent premature disclosure of an investigation so that the Board can present its strongest case in court. *Wellford* v. *Hardin,* 444 F.2d 21 (4th Cir. 1971).

Wellman is not without protection from arbitrary action by the Board. *See NLRB* v. *Poinsett Lumber and Mfg. Co.,* 221 F.2d 121 (4th Cir. 1955); *W. T. Grant Co.* v. *NLRB,* 337 F.2d 447 (7th Cir. 1964); *NLRB* v. *Vapor Blast Mfg. Co.,* 287 F.2d 402 (7th Cir.), *cert. denied* 368 U.S. 823 (1961). But there is no showing of arbitrary action in this case; therefore, the Company must await a final order of the Board and, if aggrieved, pursue its right of review in this court under Section 10(e) or (f) of the NLRA, 29 U.S.C. § 160(e) and (f).

AFFIRMED.

APPENDIX B

Opinion and Order of the District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

FLORENCE DIVISION

Civil Action No. 73-74

WELLMAN INDUSTRIES, INC.,
Johnsonville, South Carolina 29555,

Plaintiff,

—VS.—

THE NATIONAL LABOR RELATIONS BOARD and EDWARD B. MILLER, JOHN H. FANNING, HOWARD JENKINS, JR., RALPH E. KENNEDY, JOHN A. PENELLO, Members of the Board, 1717 Pennsylvania Avenue, N. W., Washington, D. C. 20570, and REED JOHNSTON, Regional Director for the Eleventh Region, 1624 Wachovia Building, 301 North Main Street, Winston Salem, North Carolina 27101,

Defendants.

This matter is before the Court as a result of a temporary restraining order issued by Honorable Robert W. Hemphill enjoining the defendants from taking any action in relation to certain cases presently before the National Labor Relations Board involving plaintiff's Johnsonville,

South Carolina plant. The plaintiff asks this Court to take jurisdiction to review the Board's refusal to hold a post-election hearing on election objections in proceedings conducted pursuant to Section 9 of the National Labor Relations Act (29 U.S.C. 159), and to review the Board's refusal to permit discovery of certain affidavits and statements gathered by the Regional Director of the Eleventh Region during his administrative investigation of those election objections (Board Case No. 11-RC-3365). The plaintiff seeks to enjoin the Board from proceeding with an unfair labor practice complaint issued against the plaintiff by the Board in Case No. 11-CA-5091 until the requested hearing is held and discovery allowed.

The plaintiff contends that it is entitled to disclosure of these documents under the Freedom of Information Act (5 U.S.C. 552).

The defendants have moved to dismiss the complaint under Rule 12(b) of the Federal Rules of Civil Procedure and alternatively for summary judgment under Rule 56, upon the ground that the District Court lacks subject matter jurisdiction over this procedure seeking to review NLRB proceedings and asking declaratory and injunctive relief to require the Board to hold agency hearings and to deliver copies of certain statements and affidavits taken during the Regional Director's investigation into a certification election held at the plaintiff's Johnsonville, South Carolina plant on November 17 and 18, 1971.

In August 1971, Textile Workers Union of America, AFL-CIO, filed a Petition for Certification with the Eleventh Region of the Board under Section 9(c) of the National Labor Relations Act, seeking to be certified as the bargaining representative for a group of employees at

the plaintiff's plant. An election was held on November 17 and 18, 1971 in which 488 votes were cast for the Union and 499 votes cast against the Union. Thereafter the Union filed with the Regional Director objections to the conduct of such election and the Regional Director conducted an investigation of said objections and challenged ballots and interviewed witnesses and took affidavits and statements of persons, including plaintiff's employees, and without holding a hearing issued a Supplemental Decision, Order and Direction of Second Election. Shortly after receiving notice of the Supplemental Decision, plaintiff requested from the Regional Director and the NLRB "any statements of any deponents or any individual from whom the Region obtained information in this matter, including particularly those statements upon which the Supplemental Decision, Order and Direction of Second Election was made or upon which the conclusions and/or findings therein were based . . . and all formal documents constituting the record in the case." The Regional Director responded to this request by indicating that "the documents upon which the decision is predicated are attached to the report." No affidavits or statements were attached to the report and the plaintiff again made demand therefor. The Regional Director has refused to make these affidavits available to the plaintiff.

On March 9, 1972, plaintiff filed with the Board a timely Request for Review of the Supplemental Decision, Order and Direction of the Second Election and this was based *inter alia* that it had been denied due process by being denied a hearing and being denied access to employee statements obtained by the Regional Office during its investigation of the Union's objections. Plaintiff's request for review was denied by the Board on the ground that it raised no issues warranting review.

On April 19 and 20, 1972, a second representation election was conducted in which a majority of the voters chose the Union as their bargaining representative. The company filed objections to the election and on June 14, 1972, the Regional Director issued his Second Supplemental Decision and Certification of Representative, wherein he found that, even assuming that the company's factual allegations in its objections to be true, these facts would not amount in law to a justification of setting aside the second election. The Regional Director certified the Union as a collective bargaining representative, and on July 7, 1972 the plaintiff filed with the Board a request for review setting forth its election objections, including the failure to provide a hearing and the failure to furnish it with copies of employees' statements. This request for review was denied and so was plaintiff's motion for reconsideration.

Thereafter the company refused to bargain and on October 5, 1972, the General Counsel of the Board issued a complaint against the plaintiff based upon its refusal to bargain. The plaintiff entered certain affirmative defenses to the action by the general counsel and the general counsel has moved to strike these affirmative defenses and also moved for summary judgment before the Board. The plaintiff thereafter moved before the Board for a hearing and production of documents under the Freedom of Information Act. These matters are presently before the Board and have not been acted upon due to the restraining order of Judge Hemphill dated January 15, 1973.

Except for the Freedom of Information Act, this identical question was presented in the case of *Intertype Co.* v. *Penello,* 269 F. Supp. 573 (W.D. Va. 1967), 401 F.2d 41 (4th Cir. 1968). In a very clear and convincing opinion

Judge Michie held that the Federal District Court does not have jurisdiction to police and review proceedings in progress before NLRB without a showing that established procedure for judicial review is inadequate and that a specific statutory right has been abrogated.

Intertype is based upon the decision of *Myers* v. *Bethlehem Ship Building Corp.*, 303 U.S. 41 (1938) which established that a District Court does not have jurisdiction to enjoin a hearing before, or to review any interlocutory order of, the NLRB because Congress has vested the exclusive power of review in the Circuit Courts of Appeals, and that there must be an exhaustion of administrative remedies.

Myers has been consistently followed, but a few exceptions have developed. These exceptions are rare and involve exceptional circumstances not present in the litigation now before this Court. The first exception is where International implications are present. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

The second exception allows District Court jurisdiction where there has been a substantial showing that Board action has infringed the constitutional rights of the complaining parties. *Fay* v. *Douds*, 172 F.2d 720 (2nd Cir. 1949). This exception has not been followed or allowed by all of the circuits.

In the present case if there has been an infringement of the constitutional right, such infringement will be heard and considered by the Circuit Court of Appeals and remedied in its opinion. The plaintiff alleges that it will be irreparably damaged during the normal administrative process before the National Labor Relations Board and the time necessary for appeal to the Court of Appeals. This claim of irreparable damage by the plaintiff is alleged:

> "That plaintiff will be subject to interference with its business; that there will be numerous plant intrusions by both union officials and other persons normally connected with bargaining sessions . . . agents and servants of plaintiffs will be required to attend bargaining sessions . . . harmonious relations will be destroyed with employees".

Plaintiff also alleges that additional attorneys fees will be incurred and a tremendous amount of time will be necessary in preparation for bargaining.

None of these interferences or alleged damages will occur until after the present litigation before the NLRB has been ended and reviewed by the Fourth Circuit Court of Appeals. If the plaintiff is successful in the proceedings before the NLRB or on appeal to the Fourth Circuit then the above interruptions, intrusions and expenses will never occur. These allegations are now in the realm of speculation. This Court agrees with Judge Michie that *Fay* v. *Douds* should not be followed, at page 578 of *Intertype*:

> "However, more appropriate reliance may be placed upon the reasoning of the Court of Appeals of the Seventh Circuit in *Chicago Automobile Trade Assn.* v. *Madden, supra,* 328 F.2d at page 769, where the Court concluded that an allegation of constitutional harm which might be corrected by later administrative action or upon judicial review with little chance of intervening irreparable injury does not warrant district court jurisdiction."

The third exception allowing district court action is where the Board has acted in excess of its delegated powers and contrary to a specific prohibition of the National Labor

Relations Act. See *Leedom* v. *Kine*, 358 U.S. 184 (1958) which does not apply to the present case.

The fourth exception stated in *Deering-Milliken, Inc.* v. *Johnston*, 295 F.2d 856 (4th Cir. 1961) involved such a delay on the part of the Board as to constitute an exhaustion of administrative remedies, and is not applicable here.

The plaintiff contends that without the affidavits and statements of its employees, it has been denied the constitutional right to effective assistance of counsel protected by the Sixth Amendment. The Court finds that this is an allegation of constitutional harm which can be corrected on judicial review of the matter presently before the NLRB.

The plaintiff also raises the constitutional issue of the Fifth Amendment in that it has not been able to obtain a hearing in the representation proceedings and is thereby denied due process of law. In *NLRB* v. *Bata Shoe Co.*, 377 F.2d 821 (4th Cir. 1967) it was held:

> "Due process of law demands and the present Rules and Regulations of the Labor Board provide that where there is a substantial and material issue of fact relating to the validity of a representation election that a hearing be conducted at some stage of the administrative proceeding before the objecting parties' rights can be affected by an enforcement order."

The Board contends that there is no substantial and material issue of fact relating to the Supplemental Decision, Order and Direction of Second Election, since it was immaterial whether it accepted the plaintiff's date for distribution of a certain handbill or the Union's date of such alleged distribution, since either date did not allow an adequate opportunity to respond to the substantial misrepresentations contained therein.

If a substantial and material issue of fact is created by the conflicting claims of the plaintiff and the Board as to the materiality and truthfulness of the representations in the handbill and of the opportunity or the ability of the Union to adequately respond, these matters may also be reviewed by the Circuit Court of Appeals and do not require this Court to enjoin the administrative proceedings which appear to be on their way to a conclusion and a judicial review by the Circuit Court as provided in the Act.

The Freedom of Information Act creates a very difficult question for this Court. This Act is mentioned in *Intertype*, but at the time it had not become effective and was therefore not considered by Judge Miche. The Board contends that the affidavits, statements and other material sought by the plaintiff are exempted from the Freedom of Information Act under 5 U.S.C. 552(b)(4) and (7). The Court finds this argument rather weak, since exception 4 is for "trade secrets and commercial or financial information obtained from a person and privileged or confidential;" and exception 7 covers "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."

Obviously, statements taken in connection with the conduct of the First Election are not trade secrets or commercial or financial information, privileged or confidential, obtained from a person.

As to exception 7, it must be remembered that this is not information originally contained in "investigatory files compiled for law enforcement purposes". The statements and affidavits were taken in connection with the certification election, a non adversary proceeding, and before any complaint was brought by the Board for an unfair labor practice.

The issuance of an injunction is an equitable remedy and the Freedom of Information Act provides:

> "5 U.S.C. 552(a)(3). On complaint, the District Court of the United States in the district in which the complainant resides, or has its principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the Court shall determine the matter de novo and the burden is on the agency to sustain its action."

In considering whether or not to issue an injunction, this Court must consider all of the facts before it, the purposes and needs of the parties, the burdens involved, the importance of the information and the reasons for non-disclosure. Foremost in the mind of the Court is the fact that the question of the plaintiff's rights under the Freedom of Information Act will be before the Circuit Court of Appeals in the very near future, whether this Court does or does not issue an injunction. The proceedings before the NLRB, including the plaintiff's rights under the Freedom of Information Act, will soon be before the Circuit Court for review, under the procedures provided by the National Labor Relations Act, without the interference from this Court. This is the teaching of *Myers* and *Intertype*. If the present action had been brought a year ago, when the Board first refused to deliver the statements and affidavits, this Court would probably have taken jurisdiction. However, the case before the Board has now proceeded to a point where the legal questions can be considered by the

Court of Appeals at an early date. For this Court to take over the litigation now would probably cause unnecessary delay.

For these reasons the Court finds that the temporary injunction issued January 15, 1973 must be dissolved and that the Court will not assume jurisdiction to declare and adjudge the rights of the parties in the present action.

IT IS, THEREFORE, ORDERED that the complaint be and the same is hereby dismissed.

AND IT IS SO ORDERED.

ROBERT F. CHAPMAN
United States District Judge

February 22nd, 1973
Florence, South Carolina